

Mortgage Broker Practices Act Rulemaking
Panel Meeting Minutes
July 13, 2006

Panel members present: Chuck Cross, Catherine Mele-Hetter, Laura Kiel, Jeff Berglund, Adam Stein, and Jeffrey Lorsch

Absent: Rich Bennion

1. Welcome and Introductions

Chuck introduced the Panel.

2. Meeting Format and Protocols

Chuck skipped. It is becoming routine for everyone.

3. Document Status Report

Chuck skipped this agenda item. We will get to the details in agenda item #6.

4. Reading and assignment of public comments to date – Deb Bortner

Deb summarized the two comments.

The first one was about exclusive agents of bank affiliates. The commenter is interested in their loan originators being exempt. We responded to the commenter and have also dealt with this in the rules.

The second comment is about “taking a residential mortgage loan application” and solicitation. He suggests we revisit this again in the definition section by taking “soliciting” out of the definitions. He still wants loan originators to only be able to work for one company. The loan originator needs to state on the application who they are working for.

Chuck – There are two points that DFI becomes concerned about where violations could occur that we might take an enforcement action for if necessary:

1. The receipt of any money, trust funds.
2. The taking of an application.

Adam – Adam recommends that we limit that disclosure at either of those two stages.

Whittier – Look at page 45 in the draft WAC. That area is covered with a rewritten section and an existing section.

Chuck – The first concern was about solicitation and whether that triggers the loan originator definition or not.

The other comment was whether we would limit loan originators to work for one company. The statute is not written that way. Most reasons revolve around the independent contractor status. The second comment becomes a mute point. We have addressed it in rules as best we can on how you establish the interaction with the consumer early on.

We need to take this suggested rewrite to the Licensing Sub-Panel or Misc. Sub-Panel. John Wilde distributed copies of his suggested language.

There was discussion about “taking” the loan application.

Chuck – We still need to look at this and determine if a modifier is needed to explain clerical duties vs. taking an application.

Deb – This is going to be hard to weave into the Computer Loan Information systems (CLI) question.

Adam – Most systems identify the company, not an individual.

Chuck – Recap on this comment. We will further consider the first part of the comment, but we are not further considering the second part of the comment. We will check into the “taking” of an application.

5. Sub-Panel Reports

Chuck opted to skip the reports. He said the Sub-Panels are doing great work.

6. Work Session with latest WAC version

Page 2 – The Enforcement Sub-Panel included this. They want the sentence highlighted in yellow to be added. Without this addition, we would be reversing us back to the old language.

Adam – If you run into one of those acts of deception, fraud, or criminal activity, couldn't you turn it over the Attorney General's (AG's) office?

Chuck – It might only rise to the level of an administrative enforcement case, but the AG's office could reject anything that isn't a good criminal case.

Adam – That was seriously debated when the statute was written. Chuck gave several examples at the time the statute was written. Can we put sidebars on it with items that would narrow the context?

Adam – Can we table this and refer it back to the Enforcement Sub-Panel?

Jeff – Isn't this already in the statute? Isn't it a moot point?

Chuck – No. If the statute is vague, we look to the rules for the appropriate interpretation.

Keep in yellow for the July 27 Panel meeting.

Page 2 - (4) – Does the location of the mortgage broker, the potential borrower, and the residential real estate affect whether the transaction is covered under the Mortgage Broker Practices Act?

Jeffrey – Suggested language - If any of the following is located in Washington, the transaction is covered by the MBPA:

- (a) Where the mortgage broker is located
- (b) Where the property is
- (c) Where the borrower resides

Okay. Fix that language in the Sub-Panel. Jeffrey already sent the suggested language to Cindy Fazio.

Chuck – Add the words “loan originator” in addition to mortgage broker per Jeffrey's draft language.

Page 7 – (16) Definition of “Control” and Page 13 – (41) Definition of “Principal” - Jeffrey - There is twenty percent on (16) (b) and ten percent on (41).

Cindy – There were some changes in formatting that came from the AG's office.

Chuck will review that. If there isn't a reason for the discrepancy, we'll make it consistent.

Deb – We did a lot of research on who is a principal and who can be a controlling person. Principal is statutorily ten percent. Maybe controlling should be ten percent also.

Chuck to Cindy - There are two (41)s on this draft. They need to be renumbered.

Page 9 – (25) (c) – Jeffrey – How do mortgage brokers know what is prohibited by these other statutes?

Chuck – If you are breaking one of these laws, you are not showing the character and fitness that financial misconduct is part of.

Jeffrey – Okay. It means if we are breaking other laws, we have a problem.

Page 10 – (29) (a) and (b) - Adam – This is where we need to clarify clerical work vs. taking an application.

Chuck – We can't change (a) or (b), because they are right out of the statute.

Adam – Maybe we could define “data entry” or “clerical.”

Jeffrey – Should we define “processor?”

Page 11 – (33) “Material litigation” - Jeffrey – Do we really need to define “material litigation?”

Deb – If the word isn't used anywhere else, we will take the definition out.

Page 12 – (40) “Prepaid escrowed costs of ownership” - Jeffrey - Suggests changing “security property” to “securitized residential real estate.”

Deb – We already made that change after this version was published.

Chuck – Check “security property” to see if that is the term from the statute.

Cindy – That definition isn't in the statute.

Chuck – Double-check .0304 of the statute to make sure that phrase isn't in there before you make that change.

Page 12 – Adam – He asked Chuck to explain what the intent of the comment “vis-à-vis wholesale lending” means?

Chuck – Chuck and Whittier are working with Joe Vincent, General Counsel at DFI. The legislature discussed Fannie Mae and Freddie Mac exemptions. There are concerns whether the statute was intended to cover wholesale lending. Our interpretation is that they didn't. Reading it purely from a legal point, it appears to Joe that the legislature intended to cover wholesale lending. Joe has an interpretive letter written to discuss with the Director within the next week. The Fannie Mae and Freddie Mac exemption still stands. That will be most of the people we're talking about, including banks.

Page 16 – 8. - Adam – He had a question about “other person subject to the act.”

Chuck – This covers a person who is exempt but still subject to some of the Act.

Pages 15-18 – Chuck – Take the yellow highlights out of the **C. GOOD STANDING** section. It’s okay.

D. EXEMPTION FROM LICENSING

Page 19 – first question – **If I am licensed as an insurance agent under RCW 48.17.060, must I have a separate license to act as a loan originator or mortgage broker?**

Answer - Cindy reworked the paragraph to add in the “assisting” language.

Page 20 – first question – **If I am an exempt mortgage broker because my business has been approved and is subject to audit by Fannie Mae or Freddie Mac, are my loan originators subject to licensing or any other sections of the act?**

Laura – There was a lot of discussion about this at the last Panel meeting. Independent contractors (loan originators) can have independent contractors working under them.

Chuck – He doesn’t want loan originators to have independent contractors working under them.

Laura agrees.

Chuck – He is not sure if we have the statutory authority to prohibit it, but he is comfortable not allowing it.

Page 20 – second question – **As an attorney, must I have a mortgage broker or loan originator license to negotiate a residential mortgage loan in the course of my practice?**

Answer – (1) - Jeffrey – Are we defining what “incidental” is? He would like to add that incidental includes “you not being paid additionally for assisting or negotiating a residential mortgage loan application.”

Adam – He likes the verbiage as it is defined on the top of page 21 – A “customary” real estate commission does not include receipt of compensation or gain associated with the financing of the property.

Suggested new language for the second question on page 20 – “A “customary” attorney fee . . . “

Jeffrey - (2) – Change “may” to “would” in the sixth line down.

Page 20 – third question - **As a licensed real estate broker or salesperson, must I have a mortgage broker or loan originator license when I assist the purchaser in obtaining financing for a residential mortgage loan involving a bona fide sale of real estate?**

Page 21 – answer - Jeffrey – Add “listing or” to “purchase and sale agreement” in the seventh line down.

Page 21 – first question – **Under what circumstances will the director approve an exemption under RCW 19.146.020 (4) for the loan originators of an affiliate of a bank that is wholly owned by the bank holding company that owns the bank?**

Adam suggested that the loan originators be called “exclusive agents.” Some of that has to do with the national database coordination.

Adam – But . . . what if they are called “exclusive agents,” is he prohibiting them from also working as a loan originator?

Chuck – Yes. The company loses that exempt status if they work for a licensed mortgage broker as a loan originator also. In your case, the lender wouldn’t be seeking that exemption, because they can only do that when the “exclusive agents” are W-2 employees.

Chuck - This is not settled yet. We have a couple large lenders that want to access this exemption that are negotiating fine details with us.

Cindy – Can we refer to them as “exclusive agents” then?

Chuck – Yes, except for section (1) (a). We need to say that we’re talking about “exclusive agents” that are operating as loan originators.

Catherine – She thinks we should call them loan originators. Why can’t we call them loan originators and exempt loan originators?

Chuck – When you look at the statute, they are referred to as “exclusive agents.”

Chuck – This whole section is still being discussed. Leave it in yellow highlights.

Adam – (b) How are you going to track continuing education for an exempt entity?

Chuck – We can’t. If their policies and procedures say they have a requirement for continuing education, we have to believe them.

Page 22 – first question – **When is a CLI provider exempt from the licensing requirements of a Mortgage Broker Act?**

Change “a” to “the” and add “Practices” before “Act.”

Page 23 – answer (3) c. - Adam - How will this affect Internet mortgage generators who do not directly issue loans, but point a borrower in the right direction?

Chuck – What about (3) d.? At what point have they taken a loan application? Chuck will ask Joe Vincent and ask him to cross-reference the definition we have created of “application.”

Page 23 – first question – **When is a CLI provider required to have a mortgage broker license?**

Chuck – Much of this is based on HUD’s work on CLIs that came out years ago.

Page 24 – top of page – Definition of “loan application” again. It doesn’t say anything about property. We need to be careful that we have not created a new definition of “loan application.” The Misc. Sub-Panel can discuss this with Joe Vincent.

Skip reviewing this section for now. Leave this in yellow highlights.

Page 28 – Cindy’s note – middle of page - This entire paragraph is included in the good standing language. Does good standing apply?

Chuck – No, good standing does not apply. Some of the elements of good standing apply, but we need to list those elements individually, and not refer to “good standing.”

Page 30 – third question – **When may the department issue interim mortgage broker licenses?**

Adam – Do we need to add a list of licensing requirements?

Chuck prefers to leave it a little broad. We could list items, but that list might be too limiting.

- Application has to be complete
- Paid your fee
- Fingerprint cards
- Quick database background check

Chuck – We will come up with a “such as:” list for next time. That list will be in yellow highlights. The rest can turn to black.

Page 31 – first question – **May I still conduct my mortgage broker business if my mortgage broker license has expired?**

Jeffrey – (2) He isn't comfortable with the six months.

Cindy – We had significant discussion last time. You'll see that answered in this document. The answers are not at all consistent.

Page 34 – second question – **If my designated broker leaves, may I continue to operate my mortgage broker business?**

Answer - Okay as written. Remove the comments and yellow highlights on page 34, 35, and the top of page 36.

Page 38 – fifth question – **When may the department issue interim licenses?**

Adam - Adam has a concern about interim licenses again. He thinks it would be beneficial to say what the substantial initial requirements are for a branch license.

Use similar language as we did with the loan originators on page 50 – second question.

Page 40 – fourth question – **Must I have a designated broker at each branch?**

Adam - Should we reference the statute where we listed the situations where the designated broker is responsible?

Page 40 - Before **F. DESIGNATED BORKERS**. Add a new question – “Under what situation is the designated broker liable?”

Cindy – Enforcement is working on that now.

Page 41 – (b) (iv) - Chuck – Change “lender” to “lender(s)” in the first line.

Jeffrey – Should we let the designated broker work for more than one company?

Chuck – You could have one designated broker that runs one enterprise, one company that does conventional loans and one company that does government loans.

Page 42 (4) – answer on top of page – Chuck - The good standing question only kicks in if you change a designated broker (additional or replacement).

Chuck to Cindy - Look back at page 15 (2). We will think about it some more. The language isn't quite right.

Page 42 – fourth question – **May a designated broker have clerical or administrative personnel?**

Chuck – He doesn't like this.

Adam – He's okay with them having employees as long as they are clerical and not loan originators.

Chuck – The statute says the mortgage broker and their bond is responsible for violations committed by its employees. There is no consumer protection.

Laura – They would need to be employees of the mortgage broker, not the loan originator.

Page 45 – first question – **May a loan originator transfer loan files to a mortgage broker other than the mortgage broker the loan originator is associated with?**

Cindy – We removed this language at one point. Do we want it left in?

Leave it in.

Page 47 – last question – **Must I have a loan originator license if I work as an independent contractor for a company exempt from licensing?**

We already answered this earlier. Only its employees are exempt.

Page 50 – second question – **When may the department issue interim loan originator licenses?**

There is “undue delay” again. Use the same language as we did on page 38, fifth question - **When may the department issue interim licenses?**

Page 55 – first question - **May I take the same loan originator continuing education course multiple times to meet my annual requirement?**

Adam – Why is this “subject to the director's discretion?”

Chuck – Delete the “s” in “year” and delete “subject to the director's discretion.”

Chuck – Make the same language change for designated brokers on page 44.

H. REPORTING REQUIREMENTS

Page 55 – fifth question - **As a licensed mortgage broker, what annual report must I provide to the department?**

Jeff – (a) and (b) – Add “secured by Washington real estate.”

Page 58 – first question – **What are my responsibilities when I sell my business?**

Jeffrey – Had comments on (3), (4) and (6).

Chuck – The borrower will have paid for an appraisal at that point. We are making sure the mortgage broker has an obligation to do what the borrower wants.

Answer - (3) – Delete “and giving them the opportunity to place their loan application elsewhere.”

(4) – Chuck – There is no transference of the trust account for one thing.

Adam – Recommends that we table this and research other industries (escrow, real estate, etc.). Leave (4) and (6) in yellow for next time and note that Jeffrey has concerns about the flow of the transaction.

Page 62 – third question – **May a mortgage broker or loan originator accept and hold a check from a borrower that is made payable to a third party and intended to be used to pay for third-party provider services without depositing the check into a trust account?**

Chuck will read this and think about it. He needs time to consider this.

J. OUT-OF-STATE MORTGAGE BROKERS AND LOAN ORIGINATORS

Page 70 - Cindy – Most of these questions are duplicates, except for the registered agent information, which is from the old rules.

Page 72 – Chuck – These disclosures came from the old rules.

O. DIRECTOR AND DEPARTMENT POWERS

1. Examination Authority

Page 73 – fourth question – **Will the department give me advance notice of an examination?**

Answer – (1) - Adam – Add “with consent of the mortgage broker if it is going to be less than thirty days.”

Adam – Is the Examination Manual finished and posted on the website yet?

Chuck – No. Chuck had some changes. The exam staff is working on those changes this week.

Chuck said it is our intent to do some training sessions on the exam manual this fall through WAMB and NAPMW.

Skip from page 74 to page 82 to discuss some appraisal issues.

Page 82, Section M

PROHIBITED PRACTICES QUESTIONS (Section M)

Chuck – Chuck discussed with Jim Irish, representative from the appraisal industry, that we create a safe harbor for mortgage brokers if they use a model form to request appraisals. The form would have the requesting or appraisal ordering information within it. If the appraisers use the form, they have a safe harbor from being scrutinized for having discussed or suggested values.

Laura – She likes that idea.

Page 82 – third question – **May I discuss or suggest property values with an appraiser, prior to the appraisal, without that discussion or suggestion constituting an attempt to improperly influence the appraiser?**

Adam – He wants to see an answer to the placeholder question (above) first.

Chuck – The creation of a safe harbor doesn't say that if you don't avail yourself of the safe harbor, you have committed a violation. Everything is the way it is right now.

Jeff – Are we damaging the consumer by allowing them to spend hundreds of dollars for an appraisal that is so far out of market, we have not done them a service? We can't have discussions because we have already ordered the appraisal using the safe harbor form.

Adam – He wants to see more analysis of what is coming and answers to where this form is going.

Laura – Is the safe harbor an order form?

Chuck – Yes.

Jeff – We need to know where the appraisers are coming from on their side, what they can talk to us about and what they can't.

Adam – There may be more we can do under (9) on page 83, under what is undue influence on an appraisal.

Next meeting – We may have to have another extended meeting on July 27.

7. Public comments

John Wilde –

Re: John's handout he gave the Commissioners – He was trying to add input on page 10 and 11, starting on (29) "Loan Originator."

He heard Chuck say that language came from the statute, so he'll have to go back to add a (c) and (d).

Maybe we need to say "offers or accepts a residential mortgage loan" instead of "takes."

Chuck – "Takes" is out of the statute.

Page 4 – John (4) – "Application" means and "Application fee" – That makes me think there are two kinds of applications.

Chuck (5) – There are two kinds of applications. It should read a "Licensed application fee" and that would fix the confusion.

Page 8 – (24) Federal statutes and regulations – Maybe these shouldn't be in the definitions. There are no quotation marks around federal statutes and regulations.

Cindy – These are citations to specific laws.

Chuck – We can talk about that. We could say "federal statutes and regulations" used in these rules are:

Page 12 – (40) Could you change "security property" to "in regards to the property being secured?"

Page 17 – second question – **What department determinations may be challenged through a brief adjudicative proceeding?**

Does it say you can challenge anything that determines you are not in good standing in sections nine through twelve?

Chuck – Yes. Cindy, can we put a WAC reference in there also?

Page 20 – first question answer- Add an “s” to “section” in the third line down.

Page 41 (b) (iv) – Can you use the word “accumulative” time between the lenders?

Jim Irish –

Jim is the President of Appraisers Coalition of Washington.

The appraisers he spoke with are interested in pursuing the possibility of using a uniform appraisal order form.

Chuck – Jeannette will schedule a 2-hour meeting in the next couple of weeks with Jim Irish and others to discuss using a uniform appraisal order form.

- Jim Irish
- Ralph Birkedahl from DOL
- Two Commissioners – Adam, Laura or Jeffrey (2 only)
- Representatives from the appraiser industry

John Long –

Continuing Education – Speaking on behalf of PREMEA (Professional Real Estate and Mortgage Educators Association). He didn’t see anything about how courses are delivered. (i.e. electronic, via the Internet, etc.)

Chuck said we are trying not to dictate that.

John - We ran a survey of 22 states that have continuing education requirements that are gauged by clock hours. We found no states that were geared by courses. The average hours required annually per state were 8.9 hours. He thinks, for example, three-hour courses would not meet the national average. Our state has taken such enormous strides in regulatory areas, but we might be opening the doors for a contest to see how short a course could be. He’s proud to say he’s from Washington, because we have one of the finest systems of enforcement out there. DFI’s only recourse would be to examine the approved professional organizations and possibly revoke their ability to offer courses. We may open ourselves up to a lot of investigatory work. PREMEA thinks a minimum number of courses is great, but why not also require a minimum number of clock hours?

John gave the Panel a copy of his research with details for each state.

Laura – She agrees that we should possibly look at number of hours again in keeping with consistency in the industry with other states.

Chuck – DFI has left it up to the industry for continuing education requirements.

Adam – If the courses are four hours, requiring loan originators to take two courses would equal eight hours, and requiring designated brokers to take three courses would equal 12 hours.

Page 9 – Definition of “Financial misconduct” - John’s comment is more from general civil liability, because the citizen always has the right of private action. Under financial misconduct (c) - There are certain capacities of these other industries that have fiduciary obligations. Every lawsuit that he has defended, there has been an allegation of breach of fiduciary duty.

Chuck – Financial misconduct only matters in the statute and rules when we are measuring a gross misdemeanor of financial misconduct. It won’t ever appear in a civil proceeding or an administrative proceeding.

Chuck – We can fix this. We can say “Financial misconduct for the purposes of a gross misdemeanor. A gross misdemeanor under XXX means . . . “

John Wilde –

He is really against loan originators working for more than one company. It may cause confusion to the consumer of not knowing who they are dealing with.

Meeting called to order: 2:08 p.m.

Meeting adjourned: 5:00 p.m.